Supreme Court, U.S.
FILED
APR 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-994

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

May an award of attorneys' fees under 42 U.S.C. § 1988 include compensation for expert witnesses?

RULE 29.1 LISTING

The listing of subsidiaries and affiliates filed in the Petition for Writ of Certiorari remains accurate.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit (Pet. App. at A-1 to A-49) is reported at 885 F.2d 11. A subsequent decision of the Court of Appeals (Joint App. at 140-59) granting, in part, West Virginia University Hospitals, Inc.'s motion for attorneys' fees and costs has not yet been reported. West Virginia University Hospitals, Inc. v. Casey, No. 89-5165 (3d Cir. March 12, 1990). The opinion of the United States District Court for the Middle District of Pennsylvania (Pet. App. at B-1 to B-68) is reported at 701 F.

Supp. 496. A memorandum opinion of the District Court (Pet. App. at C-1 to C-4) concerning an award of attorneys' fees was not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was issued on September 5, 1989. An order, denying petitioner's timely request for a rehearing, was issued by the Court of Appeals on October 5, 1989. The mandate of the Court of Appeals was issued on October 13, 1989.

The petition for a writ of certiorari was filed on December 22, 1989 and was granted on February 26, 1990.

The jurisdiction of this Court to issue a writ of certiorari in this case is based upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988.
Proceedings in vindication of civil rights; attorney's fees

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS § 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS § 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

West Virginia University Hospitals, Inc., (hereinafter referred to as "WVUH") operates a tertiary medical center[1] in Morgantown, West Virginia, six miles south of the border between the Commonwealth of Pennsylvania and the State of West Virginia. 701 F. Supp. at 498-99 (Findings of Fact Nos. 7, 14, and 15); Pet. App. at B-3 to B-4. It is one of only 121 major academic medical centers in the United States. 701 F. Supp. at 500 (Finding of Fact No. 26); Pet. App. at B-6. WVUH offers several medical services that are not available in the hospitals located in southwestern Pennsylvania. 701 F. Supp. at 499 (Findings of Fact Nos. 14-21); Pet. App. at B-4 to B-5. As a consequence, WVUH is a significant provider of hospital services to Pennsylvania medicaid recipients living in southwestern Pennsylvania. 701 F. Supp. at 498-499 (Findings of Fact Nos. 8-13 and 30-41); Pet. App. at B-3 to B-4 and B-6 to B-8. In fact, WVUH provides inpatient hospital care to more Pennsylvania medicaid recipients than over one-half of the hospitals located in Pennsylvania. 701 F. Supp. at 500 (Finding of Fact No. 42); Pet. App. at B-8.

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1 A "tertiary" hospital provides a level of medical services that is inherently more complex than and is generally not provided by community hospitals. 701 F. Supp. at 499 (Finding of Fact No. 14); Pet. App. at B-4.

In January, 1986, Pennsylvania's Department of Public Welfare notified WVUH of new medicaid payment rates for WVUH's hospital services to Pennsylvania medicaid recipients. Convinced that the new payment rates were contrary to the minimum standards for reimbursement specified in the Social Security Act,[2] WVUH attempted to resolve the problem of its inadequate reimbursement administratively. However, the Pennsylvania Department of Public Welfare informed WVUH that any administrative appeal, based upon the inadequacies of the methodology employed by Pennsylvania in her reimbursement of out-of-state hospitals, would not lead to any relief. See 701 F. Supp. at 521-22; Pet. App. at B-56.

Consequently, in July, 1986, WVUH filed suit in the United States District Court for the Middle District of Pennsylvania. WVUH challenged the adequacy of Pennsylvania's payment system and the adequacy of Pennsylvania's medicaid administrative appeals system under federal law.[3] The jurisdiction of the District Court was based upon 28 U.S.C. § 1331, 28 U.S.C. § 1343(3) and (4), and 28 U.S.C. § 1332. WVUH also sought remedies under 42 U.S.C. § 1983 and under 28 U.S.C. § 2201.

In May, 1988, the District Court conducted a six-day trial. At trial, WVUH depended principally upon the testimony of three expert witnesses who testified about the deficiencies in Pennsylvania's payment system for out-of-state hospitals like WVUH and the inadequacy of Pennsylvania's administrative appeals system. After the defense rested, WVUH called a fourth expert witness to rebut testimony provided by the Pennsylvania defendants concerning how Pennsylvania reimbursed hospitals for the costs of direct medical education. The District Court found that these experts' work for WVUH was "essential" to WVUH's success. See Pet. App. at C-1 to C-4.

As the exhibits to the Joint Fee Proposal, which was submitted to the District Court, reflect, WVUH's experts began work in 1986. Joint App. at 112-39. That work included several essential tasks that enabled WVUH's attorneys to prosecute the lawsuit successfully. For example, the experts from Coopers & Lybrand, a nationally recognized accounting and consulting firm, were required to: (1) review and analyze the complex Pennsylvania medicaid reimbursement system for Pennsylvania hospitals; (2) analyze the financial data to determine the probable magnitude of WVUH's financial loss and WVUH's ability to sustain such losses on a continuing basis; (3) review and analyze data provided by the Pennsylvania defendants and the Hospital Association of Pennsylvania through the discovery process; (4) prepare necessary exhibits; and (5) provide advice and educate WVUH's counsel about medicaid reimbursement policies and systems. See Joint App. at 121-22, 131, 133, 135-36. These tasks were made more complicated because they stem from a "Byzantine" statute that is "almost unintelligible to the initiated." Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981). A review of the experts' trial testimony, which laid a foundation for their opinion testimony, provides a partial description of the substantial amount of pretrial work they performed for WVUH and its counsel. See Joint App. at 14-31, 33-48, 62-67, 73-78.

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2 WVUH also believed that the payment rates for non-Pennsylvania hospitals violated the Equal Protection Clause because Pennsylvania discriminated in its payments depending upon whether a hospital was located in Pennsylvania or out-of-state. The evidence at trial proved that, on average, Pennsylvania reimbursed 95% of the costs of Pennsylvania hospitals but only 54% of WVUH's costs in providing care to Pennsylvania medicaid recipients. 701 F. Supp. at 509 (Finding of Fact No. 183); Pet. App. at B-29; see also n.3 infra.

3 WVUH alleged four causes of action in its complaint:
(1) the inadequacy of the payment system under 42 U.S.C. § 1396a(a)(13)(A);
(2) the lack of any basis-in-fact for the assurances Pennsylvania officials provided the Federal Government about the payment system as required by 42 U.S.C. § 1396a(a)(13)(A);
(3) the inadequacy of the administrative appeals system under 42 U.S.C. § 1396a(a)(37) and the implementing federal regulations; and
(4) a violation of the Equal Protection Clause of the United States Constitution due to the irrational discrimination in payments made by Pennsylvania's medicaid program to out-of-state hospitals as contrasted to payments made to in-state hospitals.

WVUH needed well-qualified experts to overcome the presumptions that normally attach to state officials' actions and to demonstrate the illegality of Pennsylvania's prospective payment system. Especially well-qualified experts were needed also because, prior to this lawsuit, no plaintiff had successfully challenged a state's prospective payment system;[4] accordingly, both counsel and the District Court were charting new waters.[5]

WVUH's experts included Dr. Gerard Anderson, the Director of the Johns Hopkins Center for Hospital Finance and Management, the only academic-based research center in the United States that is devoted to hospital finance and reimbursement. See Joint App. at 50. Dr. Anderson was formerly the principal technical consultant on hospital reimbursement to the United States Secretary of Health and Human Services. Joint App. at 54-57. In that position, he helped design, explain to Congress, and implement the Medicare Program's prospective payment system for hospitals. Id. That experience was invaluable to WVUH not only at trial but also during the pretrial preparation of the case.

Likewise, Dr. Paul Grimaldi, the Director of Health Economics Reimbursement Policy at Coopers & Lybrand, is a nationally recognized expert on prospective payment systems, having pioneered the nation's first medicaid prospective payment system in New Jersey. Joint App. at 69-70. An author of books that are considered source

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4 During the course of the lawsuit before the District Court, the only other directly applicable federal precedent concerning a challenge to a medicaid prospective payment system was Mary Washington Hospital v. Fisher, 635 F. Supp. 891 (E.D. Va. 1985). In that case, the hospital was unsuccessful in its challenge.

5 The novelty of a case has been recognized as one of the factors that ought to be taken into account when awarding fees. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974) (cited with approval in Blanchard v. Bergeron, 491 U.S. __ , 109 S. Ct. 939, 943, 103 L. Ed. 2d 67, 74 (1989)). Accordingly, the novelty of this case highlights the need for experts to vindicate WVUH's rights under federal law.

authorities about prospective payment, see Joint App. at 70, Dr. Grimaldi's experience as an economist, as a former state medicaid official, and as a state hospital association official, Joint App. at 68-70, made him both an effective witness at trial and an invaluable resource to WVUH's counsel during the pretrial preparation of the case.

Based upon the evidence provided by WVUH's experts,[6] the District Court declared that Pennsylvania's payment system and her administrative appeals system violated federal law. 701 F. Supp. at 526; Pet. App. at B-67. The District Court ordered the Pennsylvania defendants to develop new payment and appeals systems by May 1, 1989. The District Court also awarded fees under 42 U.S.C. § 1988 after submission of a joint fee proposal by the parties. Joint App. at 112; see also Pet. App. at C-1 to C-4.

In making the fee award, the District Court included experts' fees of $104,133.00, having concluded that the experts' work was "essential" to the District Court's decision. Pet. App. at C-2. Indeed, the detailed factual findings of the District Court's initial memorandum opinion reveal not only the complexity of the case but also the court's heavy reliance upon WVUH's experts. See 701 F. Supp. at 498-510; Pet. App. at B-2 to B-32. The testimony of Doctors Anderson and Grimaldi, as well as the testimony of Messrs. Manak and Maher, WVUH's other expert witnesses, is repeatedly cited as the basis for many of the District Court's 201 findings of fact. Id. Given the detail of the experts' testimony, it is readily apparent that the experts expended almost two years in intense pretrial work and that this pretrial work engendered the vast majority of the fees owed by WVUH to its experts. See Joint App. at 120-39.

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6 The Pennsylvania defendants quickly stipulated to each expert's qualifications and technical expertise to provide testimony to the court. Joint App. at 48-49, 62-64, 78, 91.

Moreover, in the joint fee proposal submitted by WVUH and the Pennsylvania defendants to the District Court, the parties stipulated that the experts' work, which encompassed both pretrial and trial work, was "necessary" and that $104,133.00 was a reasonable amount of compensation for such work. See Joint App. at 117. This stipulation as to the necessity of the experts is consistent with an earlier stipulation that the case was "complex," involved technical issues outside the normal competency of attorneys, and required extensive pretrial work. See Joint App. at 8 ("This case involves complex questions of hospital and governmental accounting which require detailed preparation of preliminary studies . . . .") (emphasis added).

The Court of Appeals for the Third Circuit ultimately affirmed the District Court in all but two respects. First, the Court of Appeals held that experts' fees were not compensable in an award of attorneys' fees under 42 U.S.C. § 1988. 885 F.2d at 35; Pet. App. at A-48.[7] Secondly, the Court of Appeals reversed the District Court on the issue of the adequacy of Pennsylvania's administrative appeals system. 885 F.2d at 35; Pet. App. at A-49.

The Court of Appeals refused to rehear the case as requested by WVUH. Consequently, WVUH petitioned this Court for a writ of certiorari. That writ was granted on February 26, 1990.

SUMMARY OF ARGUMENT

In 1975, this Court held that federal courts do not inherently possess the equitable power to award attorneys' fees to a prevailing party under the "private attorney general" theory. Alyeska Pipeline

7 Subsequently, on March 12, 1990, the Court of Appeals granted, in part, WVUH's motion for attorneys' fees and costs. The Court of Appeals, however, reduced its award of attorneys' fees to WVUH by 10% because WVUH failed to prevail on appeal on the experts' fees issue. West Virginia University Hospitals, Inc. v. Casey, No. 89-5165, slip op. at 11 (3d Cir. March 12, 1990); Joint App. at 148-49, 158.

Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Subsequently, Congress acted promptly to abrogate the effects of Alyeska upon civil rights litigation by enacting the fee shifting provision in 42 U.S.C. § 1988.

Because Congress' policy or purpose controls over the literal or "plain" language of any Act of Congress, Watt v. Alaska, 451 U.S. 259 (1981), the legislative history of the fee shifting provision of 42 U.S.C. § 1988 is important. The events of 42 U.S.C. § 1988's passage reflect Congress' conclusion that a full and complete remedy was essential to ensure that the right to sue was a meaningful one. See, e.g., H. R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). This Court acknowledged Congress' purpose when it held that certain non-attorney expenses (paralegals) were compensable under 42 U.S.C. § 1988 in order to achieve the "fully compensatory" award Congress intended. Missouri v. Jenkins, 491 U.S. __, 109 S. Ct. 2463, 2470, 105 L. Ed. 2d 229, 242 (1989).

Given Congress' purpose, WVUH respectfully submits that this Court should hold that experts' fees were intended to be encompassed within the Congressional grant of discretion to the federal courts. If experts' fees were not compensable under 42 U.S.C. § 1988, plaintiffs would be discouraged, not encouraged, from bringing private enforcement actions, particularly in complex cases. Therefore, to give effect to Congress' acknowledged policy, this Court should hold that experts' fees are compensable.

This Court has avoided mechanical and ill-considered literal interpretations of statutes if such would emasculate or contradict Congressional policy. See, e.g., Markham v. Cabell, 326 U.S. 404, 409 (1945). In that tradition, the term "reasonable attorney's fee" should be construed as a "shorthand expression for such fees and other expenses as the district court might in the exercise of its equitable discretion reasonably believe should be reimbursed . . . ." Friedrich v. City of Chicago, 888 F.2d 511, 518 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230); see also H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S.

Code Cong. & Admin. News 1798, 1808 (in fee shifting statutes, Congress intends the term "reasonable attorneys' fees" to include experts' fees).

The discretion to award a "reasonable attorney's fee" is a broad power, intended to restore the pre-Alyeska practices of the federal courts, which included awards of experts' fees, either pursuant to a court's equitable powers, e.g., Bradley v. School Board of the City of Richmond, 53 F.R.D. 28, 44 (E.D. Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 416 U.S. 696 (1974),[8] or pursuant to existing fee shifting statutes from which the language of § 1988 was derived. E.g., Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cas. (BNA) 244, 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974).[9]

Furthermore, the Senate Report explaining the bill explicitly referred to three pre-Alyeska cases as exemplifying the standards that would govern awards under § 1988; one of those cases awarded experts' fees. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5913 (citing Davis v. County of Los Angeles). Accordingly, Congress intended to embrace awards of experts' fees within the broad nomenclature of "reasonable attorney's fee."

The avoidance of an ill-considered "plain meaning" construction also avoids a form of increased judicial activism that effectively reduces the power of the legislature by adopting limiting constructions of statutes and, thus, failing to effect their underlying policies fully. Posner, Statutory Interpretation - In The Classroom And In The Courtroom, 50 U. Chi. L. Rev. 800, 822 (1983), reprinted in 3 Sutherland Stat. Const. 629, 645 (4th ed. 1984). This approach to

8 For a more complete listing of pre-Alyeska precedent based upon the courts' equitable powers, see n.15 infra.

9 For a more complete listing of pre-Alyeska precedent involving other fee shifting statutes, see n.20 infra.

statutory construction is fully consistent with this Court's conclusion that "the plain meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" Watt v. Alaska, 451 U.S. at 266.

This Court adopted a broad interpretation, rather than a limited "plain meaning" interpretation, of the term "reasonable attorney's fee" in Missouri v. Jenkins. Under Congress' policy of encouraging private enforcement actions, no reason exists to discriminate between attorneys and paralegals. Similarly, under the same policy, no basis exists on which to discriminate between attorneys and experts. Both paralegals and experts help the attorney prepare the case so that there may be a prevailing plaintiff who can ask for fees under § 1988.

While both paralegals and experts assist counsel, it would be ironic, indeed, to pay the fees of paralegals in order to encourage private enforcement of federal law but not the fees of far more valuable and indispensable experts. Thus, under Missouri v. Jenkins, experts' fees should be compensable in order to provide a prevailing party with a fully compensatory fee.

The Third Circuit's erroneous decision in this case was predicated upon its reliance upon an inapplicable precedent and its concomitant failure to apply controlling precedent. Specifically, the Third Circuit relied upon Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987), rather than on Missouri v. Jenkins. West Virginia University Hospitals, Inc. v. Casey, 885 F.2d at 34; Pet. App. A-47.

By its own terms, Crawford is not controlling: firstly, because it did not construe § 1988; and secondly, because it cites § 1988 as an exception to the general applicability of 28 U.S.C. § 1821 and 28 U.S.C. § 1920, the statutes at issue in Crawford. 482 U.S. at 444. Furthermore, 28 U.S.C. § 1821 does not encompass non-testimonial work of experts which, in this case, was the source of the majority of the experts' fees generated. Therefore, even if § 1821 had any applicability, it would not preclude reimbursement of non-testimonial work performed by experts.

The Third Circuit's rejection of Missouri v. Jenkins was error. Missouri v. Jenkins held that a literal reading of § 1988 was too limited to give proper effect to Congress' purpose of providing for a "fully compensatory fee." 109 S. Ct. at 2470, 105 L. Ed. 2d at 242. Likewise, a literal reading of § 1988 is too limited in this case if WVUH is to receive a "fully compensatory fee." The experts' work in this case was "essential" to the effective presentation of the client's case. Pet. App. at C-2. Therefore, their work should be reimbursed because, otherwise, the Congressional policy of encouraging private enforcement actions would be defeated.

ARGUMENT

I.
Experts' Fees Must Be Compensable Under 42 U.S.C. § 1988 In Order To Achieve Congress' Goal of Encouraging Private Enforcement Of The Civil Rights Statutes.

In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), this Court held that federal courts do not inherently possess the equitable power to award fees to a prevailing party in litigation under the "private attorney general" theory. Instead, this Court reaffirmed the general "American Rule" that a prevailing party may not recover fees.

The reaction of the Congress to Alyeska was prompt, decisive, and without substantial debate. A mere five months after the announcement of Alyeska, Congress conducted hearings upon legislation designed to abrogate the effects of Alyeska, and a year later, in 1976, Congress enacted the fee shifting provision in 42 U.S.C. § 1988. The substantial unanimity within and without the Congress for this legislation is noteworthy. See Awarding of Attorneys' Fees: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of

Justice of the Committee on the Judiciary House of Representatives, 94th Cong., 1st Sess. 1 (1975).[10] The swift, concerted action of both Congress and the public in effecting the passage of § 1988's fee shifting provision is crucial to a proper contextual understanding of what Congress sought to do.

The policy or purpose of Congress controls the literal language of a statute.[11] See Watt v. Alaska, 451 U.S. 259, 266 (1981). Consequently, it is incumbent upon this Court to ascertain Congress' policy and honor it regardless of the "rule" of construction concerning the "plain meaning" of the statute.

Following that precept, this Court has already acknowledged that Congress' policy decision in enacting § 1988's fee shifting provision was to provide a prevailing party with a "fully compensatory fee." Missouri v. Jenkins, 491 U.S. __ , 109 S. Ct. 2463, 2470, 105 L. Ed.

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10 The eight bills under consideration were opposed by only five organizations, and that opposition was not absolute. For example, Mr. Rex E. Lee, then with the United States Justice Department, opposed some of the proposed bills but noted the need for an exception to the American Rule in civil rights cases. See Awarding of Attorneys' Fees: Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. 1, 178-79 (1975). By contrast, numerous organizations and individuals, many of whom were members of Congress, supported the legislation at the hearings. Id.

11 Legislative "intent" and legislative "meaning" are not necessarily identical. The former is an inquiry into what the legislature as a body thought it was doing, while the latter is an inquiry into what the public perceives and understands the law to be after enactment. An analysis of legislative intent, which is oriented to the message of the legislature as the "sender," differs from the analysis of legislative meaning, which focuses upon the perception of the public as the "receiver" of the legislative message. See 2A Sutherland Stat. Const. §§ 45.06 to 45.08 (4th ed. 1984). Although these analyses may lead to different conclusions in a particular case, the unanimity of Congressional and public sentiment indicates that these analyses lead to the same result in this case, i.e., restoration of the pre-Alyeska practices which included awards of experts' fees.

2d 229, 242 (1989); Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). That conclusion is amply supported by the history of § 1988's amendment to authorize fee awards. See, e.g., H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) ("Unless the judicial remedy is full and complete, it will remain a meaningless right."); S. Rep. No. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.") (emphasis added).

Repeatedly, the House and Senate reports sound the same themes: (1) effective enforcement of the civil rights statutes depends upon the efforts of private citizens;[12] (2) as potential defendants, governmental entities and officials have substantial resources available to them that are not available to private citizens absent a fee shifting statute; (3) the opportunity to vindicate federal rights must be meaningful; (4) the lack of fee shifting will frustrate federal law, if not be tantamount to its repeal; (5) Congress has always instructed the courts to use the

12 WVUH's enforcement of federal law is an example of the need for private enforcement. Although, in theory, the Secretary of the United States Department of Health and Human Services can deny federal matching funds to a state's medicaid program on the basis of noncompliance with federal law, 42 U.S.C. § 1396c, that form of enforcement is a last resort. The only effective mechanism by which to enforce federal medicaid law is through private enforcement actions. Cf. Cannon v. University of Chicago, 441 U.S. 677, 705-06 (1979) (private enforcement of federal law "is not only sensible but is also fully consistent with -- and in some cases even necessary to -- the orderly enforcement of the statute"). This point is illustrated in this type of case by the fact that federal approval of a state's medicaid reimbursement plan is not a difficult or detailed process. At best, it is perfunctory. West Virginia University Hospitals, Inc. v. Casey, 701 F. Supp. at 510, 514-15; Pet. App. at B-32, B-41 to B-42; cf. Amisub (PSL) v. State of Colorado, Department of Social Services, 879 F.2d 789 (10th Cir. 1989) (federal approval of state's reimbursement plan did not signify any independent evaluation of the adequacy of that plan by the Federal Government).

"broadest and most effective remedies" to achieve compliance with federal civil rights laws; and (6) federal courts should be able to "continue" their pre-Alyeska practices. Compare H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) with S. Rep. No. 1011, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. Code Cong. & Admin. News 5908.

To achieve a "fully compensatory fee" courts must consider all legitimate categories of litigation expense; otherwise, all of the concerns noted by Congress cannot be satisfied. Experts, a recurring reality of modern litigation, cannot be ignored if the goal of a fully compensatory fee is to be achieved in order to encourage private enforcement actions. Such litigation implements national policy far more realistically than the mere placing of a statute in the statute books. Without experts, the number and success of private enforcement actions in an array of important areas of national policy will abate, leaving the federal statutes as nothing more than hollow promises of a better America.

Litigation under the civil rights statutes should not be allowed to fall prey to the exquisite perfection of linguistic purists who care little for the practical effects of their pronouncements. As a matter of federal policy -- from the perspective of any one of the three branches of our government -- it is better to have less-than-perspicuous language fairly and practicably construed to give national policy its full intended effect than it is to insist upon an overly parochial interpretation that pulls the teeth out of that policy.

A plaintiff must prove his case against government officials. That effort involves having to rebut presumptions of official regularity, correctness, and official expertise, as well as having to overcome judicial deference to administrative interpretations of law and discretionary acts. Under these circumstances, a plaintiff usually could not prove his case without experts. And, unfortunately, as so aptly expressed by the First Circuit, "Talk may be cheap, but expert testimony usually is not." Denny v. Westfield State College, 880 F.2d 1465, 1466 (1st Cir. 1989).

Given the need for experts and the consequential expense to the plaintiff, how can the unambiguous policy of encouraging vindication of federal rights be fulfilled if the fees for such experts cannot be shifted? Without any ability to have experts, a plaintiff so brave as to file suit would be limited to cross-examining the state's experts. Such a consequence is utterly at odds with the purpose of encouraging the vindication of federal rights. That purpose requires an equalization of resources, especially when the defendants can call upon the immense resources of state government.[13]

A corollary, in this instance, to the honoring of legislative purpose is the presumption that Congress does not enact statutes that do not realistically or practicably achieve the policy adopted:

> The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes . . . . The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve.

Markham v. Cabell, 326 U.S. 404, 409 (1945).

While everyone agrees that § 1988 allows a prevailing party to recover the fees he has paid directly to his lawyer, that salutary remedy is unavailing if the plaintiff's inability to afford the services of essential experts prevents the lawyer from proving the case. Accordingly, a limited, "plain language" reading of the statute makes § 1988's promise of a full and complete judicial remedy an empty one.

Simply but accurately, § 1988's reference to a "reasonable attorney's fee" is nothing more than a generally stated directive to pay a prevailing party "what it costs" to prevail.[14] See S. Rep. No. 1011, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910 ("citizens must have the opportunity to recover what it costs them to vindicate these rights in court") (emphasis added); see also Friedrich v. City of Chicago, 888 F.2d 511, 518 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230) ("Reasonable attorney's fee" is a "shorthand expression for such fees and other expenses as the district court might in the exercise of its equitable discretion reasonably believe should be reimbursed to the prevailing party . . . . [I]t is not an exhaustive description [of the

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13 In this case, the equalization of resources is vital to hospitals like WVUH. Under current hospital reimbursement methodologies employed by governmental and private payers, WVUH has little or no ability to shift costs, and any financial reserves that exist are devoted to necessary future capital improvements and technological advancements. The entire concept of prospective payment rests upon the abandonment of reimbursement based upon the actual costs of a hospital, as was the case under the former standards of reimbursement for the Medicaid and Medicare Programs. That approach has been imitated by private payers who negotiate rates for their subscribers. Thus, if WVUH hires an expert, that expense is not routinely passed along and divided up between the different payers. At WVUH, medicaid covers 23% of its patients, medicare covers 27% of its patients, and commercial payers (HMOs, PPOs, Blue Cross/Blue Shield, and insurance companies) cover 30% of its patients. See Trial Transcript at 170 (May 3, 1988). Because charity and bad debt constitute the remaining 20% of WVUH's patients, id., WVUH's ability to shift costs further is virtually non-existent. Such expenses erode reserves intended for other necessary purposes, and, thus, a fully compensatory fee award is essential.

14 The economics of modern civil rights litigation also fully warrant the Congressional policy of providing a fully compensatory award of fees to a prevailing party. Actions are often against state officials in federal court where, due to the Eleventh Amendment, damage awards cannot be made, which could otherwise be a source of remuneration for the expenses of litigation. Cf. Riverside v. Rivera, 477 U.S. 561, 574-75 (1986) (commenting upon the lack of, or smallness of, damage awards to civil rights litigants). Rarely, if ever, are contingent fee agreements used which could be sources of remuneration. Lastly, civil rights litigation does not carry with it such potential relief as treble damages which could be a source of funds. Without any of these potential sources of money to pay necessary experts, the "full and complete" nature of a § 1988 remedy is jeopardized by any construction that does not include fees for experts.

fees that may be reimbursed] . . . ."); cf. H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808 (Congress specifically states its intent that the term "reasonable attorneys' fees," when used in fee shifting statutes, includes fees of experts).

When Congress acted to overturn Alyeska, neither it nor the public indulged in the listing of discrete legal expenses, including some for payment and omitting others. If Congress had done so, a cautious and narrow construction of § 1988 might well be appropriate. Instead, Congress acted quickly and broadly to ensure that federal courts returned to the pre-Alyeska practice of paying all reasonable fees, meaning the entire expense of the litigation from its initiation to its conclusion. Surely, if Congress had decided otherwise, it would have manifested that intent somewhere within the legislative history. It did not, however. Nor did it indicate that the statute should be narrowly or literally construed so as to restrict fee awards to those fees generated by only the attorneys themselves.

Instead, the Senate Report noted that the policy was to provide the courts with the traditional equitable authority they had exercised prior to Alyeska. S. Rep. No. 1011, 94th Cong., 2d Sess. 4, 6, reprinted in 1976 U.S. Code & Cong. News 5911, 5913. The federal courts' pre-Alyeska practice of awarding fees to experts under the traditional equitable authority of the courts, therefore, demonstrates what Congress hoped to achieve with the fee shifting provision of § 1988.[15]

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15 Prior to the Alyeska decision, federal courts commonly exercised their equitable powers to award experts' fees as part of attorneys' fees awards to prevailing parties. See, e.g., Wolf v. Frank, 477 F.2d 467, 480 (5th Cir.), cert. denied, 414 U.S. 975 (1973); Kinnear-Weed Corp. v. Humble Oil & Refining Co., 441 F.2d 631, 636-37 (5th Cir.), cert. denied, 404 U.S. 941 (1971); Bebchick v. Public Utilities Commission, 318 F.2d 187, 204 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963); Wallace v. House, 377 F. Supp. 1192, 1206-07 (W.D. La. 1974), vacated in relevant part for reconsideration in light of Alyeska, 515 F.2d 619 (5th Cir. 1975), vacated on other grounds, 425 U.S. 947 (1976); Sabala v. Western

In fact, the Senate Report listed or cross-referenced some pre-Alyeska decisions that sanctioned the payment of experts' fees pursuant to a court's equitable powers.[16] Id. at 5912 and n.3. In one of these cases,

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Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974), remanded in relevant part for reconsideration in light of Alyeska, 516 F.2d 1251 (5th Cir. 1975), vacated on other grounds, 431 U.S. 951 (1977); Sims v. Amos, 340 F. Supp. 691, 695 n.11 (M.D. Ala.), aff'd, 409 U.S. 942 (1972); La Raza Unida v. Volpe, 57 F.R.D. 94, 102 (N.D. Cal. 1972); Beens v. Erdahl, No. 4-71-Civ. 151 (D. Minn. Dec. 14, 1972), summarized in Legal Fees--Hearings before the Subcomm. on Representation of Citizen Interests of the S. Comm. on the Judiciary, 93d Cong., 1st Sess. 911 (1973); Jones v. Wittenberg, 330 F. Supp. 707, 722 (N.D. Ohio 1971), aff'd, 456 F.2d 854 (6th Cir. 1972); Bradley v. School Board of the City of Richmond, 53 F.R.D. 28, 44 (E.D. Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 416 U.S. 696 (1974); Wright v. McMann, Civ. Nos. 66-CV-77, 67-CV-174 (N.D.N.Y. unpublished decree of August 19, 1970), cited in Wallace v. House, 377 F. Supp. at 1207, aff'd in part, rev'd in part on other grounds, 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885 (1972); see also Copeland v. School Board of the City of Portsmouth, 464 F.2d 932, 934 (4th Cir. 1972) (decision to award experts' fees left to discretion of the trial judge); Banks v. Chicago Mill & Lumber Co., 106 F. Supp. 234, 236 (E.D. Ark. 1950) (court has equitable "power to allow as costs the compensation paid to expert witnesses for their preparation and testimony"); Swan Carburetor Co. v. Chrysler Corp., 55 F. Supp. 794, 796 (E.D. Mich. 1944) (court has equitable power to award experts' fees and expenses in appropriate cases), aff'd in relevant part, rev'd in part on other grounds, 149 F.2d 476 (6th Cir. 1945); Andresen v. Clear Ridge Aviation, 9 F.R.D. 50, 52 (D. Neb. 1949) (court has equitable power to award experts' fees to prevailing party); cf. Welsch v. Likins, 68 F.R.D. 589, 596-97 (D. Minn.) (experts' fees and expenses awarded pursuant to court's equitable powers in decision rendered 10 days after Alyeska), aff'd, 525 F.2d 987 (8th Cir. 1975).

16 E.g., La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1973) (cited in Alyeska at n.46); Sims v. Amos, 340 F. Supp. 691, 695 n.11 (M.D. Ala.), aff'd, 409 U.S. 942 (1972); Bradley v. School Board of the City of Richmond, 53 F.R.D. 28, 44 (E.D. Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 416 U.S. 696 (1974); see also Beens v. Erdahl, No. 4-71-Civ. 151 (D. Minn. Dec. 14, 1972), summarized in Legal Fees--Hearings before the Subcomm. on Representation of Citizen Interests of the S. Comm. on the Judiciary, 93d Cong., 1st Sess. 911 (1973).

this Court vacated the Fourth Circuit's reversal of a district court award of fees that had included experts' fees; this Court then remanded that case for a new fee award, presumably one that would include experts' fees.[17]

In explaining the standards intended to govern fee awards, the Senate Report also specifically endorsed three pre-Alyeska cases, one of which included an award of experts' fees under the Title VII fee shifting statute. Id. at 5913 (citing Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cas. (BNA) 244, 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974)). The importance of these cases in ascertaining Congress' intent has been noted previously by this Court. See Blanchard v. Bergeron, 491 U.S. __, 109 S. Ct. 939, 944, 103 L. Ed. 2d 67, 75 (1989). Thus, the conclusion compelled is that § 1988 authorizes the payment of experts' fees to a prevailing party.[18] Indeed, courts have recognized that experts' fees may be included as part of an award of attorneys' fees under § 1988.[19]

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17 See Bradley v. School Board of the City of Richmond, 53 F.R.D. 28, 44 (E.D.Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 416 U.S. 696 (1974).

18 Reports of Senate or House committees have long been recognized sources of authoritative legislative history. See Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986); Blanchard v. Bergeron, 491 U.S. __, 109 S. Ct. 939, 943, 103 L. Ed. 2d 67, 73-74 (1989).

19 See, e.g., Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230); SapaNajin v. Gunter, 857 F.2d 463, 465 (8th Cir. 1988); Jenkins v. Missouri, 838 F.2d 260, 266 (8th Cir. 1988), aff'd, 491 U.S. ___, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989); Culebras Enterprises Corp. v. Rivera-Rios, 846 F.2d 94, 103 (1st Cir. 1988); Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 257 (8th Cir. 1985); American Family Life Assurance Co. v. Teasdale, 733 F.2d 559, 571 (8th Cir. 1984); Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983); Strama v. Peterson, 689 F.2d 661, 663 (7th Cir. 1982); Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201, 205-06 (3d Cir. 1981); Miller v. Carson, 628 F.2d 346, 349 (5th Cir.

Congress' selection of the term "reasonable attorney's fee" was not a new effort in creative drafting. In 1976, several statutes already employed the term, e.g., the Title VII fee shifting statute, 42 U.S.C. § 2000e-5(k). These statutes served as models for the language of § 1988. S. Rep. No. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910. Importantly, courts had already interpreted the term "reasonable attorney's fee" to include experts' fees.[20] For example, Davis v. County of Los Angeles, one of

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1980); Williams v. City of New York, 728 F. Supp. 1067, 1072 (S.D.N.Y. 1990); Black Grievance Committee v. Philadelphia Electric Co., 690 F. Supp. 1393, 1403 (E.D. Pa. 1988); United States v. Yonkers Board of Education, 118 F.R.D. 326, 330 (S.D.N.Y. 1987); Jones v. City of Chicago, No. 83-C-2430 (N.D. Ill. Nov. 10, 1987), rev'd in part on other grounds, 856 F.2d 985, 996 (7th Cir. 1988); Hillburn v. Commissioner, Connecticut Department of Income Maintenance, 683 F. Supp. 23, 27 (D. Conn. 1987), aff'd mem., 847 F.2d 835 (2d Cir. 1988); Lenihan v. City of New York, 640 F. Supp. 822, 830 (S.D.N.Y. 1986); Kirksey v. Danks, 608 F. Supp. 1448, 1459 (S.D. Miss. 1985); Rank v. Balshy, 590 F. Supp. 787, 801 (M.D. Pa. 1984); Rybicki v. State Board of Elections of State of Illinois, 584 F. Supp. 849, 861-62 (N.D. Ill. 1984); McMurry v. Phelps, 533 F. Supp. 742, 774 (W.D. La. 1982); N.A.A.C.P. v. Wilmington Medical Center, Inc., 530 F. Supp. 1018, 1027 (D. Del. 1981), remanded for full award of attorneys' fees, 689 F.2d 1161 (3d Cir. 1982), cert. denied, 460 U.S. 1052 (1983); Commonwealth of Pennsylvania v. O'Neill, 431 F. Supp. 700, 713-715 (E.D. Pa. 1977).

20 See, e.g., Tasby v. Estes, 416 F. Supp. 644, 648 (N.D. Tex. 1976) (expert witness fees are compensable pursuant to fee shifting provisions of Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (repealed 1979)); Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cas. (BNA) 244, 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974) (expert witness fees are compensable pursuant to fee shifting provisions of Title VII); see also Norris v. Green, 317 F. Supp. 100, 102 (N.D. Ala. 1965) (expert fees awarded pursuant to Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501(b)). Each of these cases involved a statute specifically cited in the legislative history of § 1988. See H.R. Rep. No. 1558, 94th Cong., 2d Sess. 3 and Appendix A (1976).

the three cases specifically identified as a model for fee awards under § 1988, involved an award of experts' fees to a prevailing party under the Title VII fee shifting statute. 8 Fair Empl. Prac. Cas. (BNA) at 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444.[21] Accordingly, Congress' conscious decision to use existing terminology with an established meaning

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21 Since 1976, federal courts have continued to rule that expert witness fees may be awarded to prevailing parties as part of an attorney's fee award made under fee shifting statutes similarly worded to § 1988. See, e.g., Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984) (Age Discrimination in Employment Act, 29 U.S.C. §§ 262(b) and 216(b)), cert. denied, 472 U.S. 1027 (1985); Chang v. Board of Education of Glen Ridge Township, 685 F. Supp. 96, 100 (D.N.J. 1988) (Education for All Handicapped Children Act, 20 U.S.C. § 1415(e)(4)(B)); Johns v. Whirlpool Corp., Civ. A. No. 86-2003 (D. Kan. Feb. 4, 1988) (Age Discrimination in Employment Act, 29 U.S.C. §§ 262(b) and 216(b)); Bruno v. Western Electric Co., 618 F. Supp. 398, 405-06 (D. Colo. 1985) (Age Discrimination in Employment Act, 29 U.S.C. §§ 262(b) and 216(b)), aff'd in part, rev'd in part on other grounds, 829 F.2d 957 (10th Cir. 1987); Cook v. Block, 609 F. Supp. 1036, 1043 (D.D.C. 1985) (Title VII, 42 U.S.C. § 2000e-5(k)); Kirksey v. Danks, 608 F. Supp. 1448, 1459 (S.D. Miss. 1985) (Voting Rights Act, 42 U.S.C. § 1973l(e)); Feher v. Department of Labor & Industrial Relations, 561 F. Supp. 757, 768 (D. Haw. 1983) (Title VII, 42 U.S.C. § 2000e-5(k)); Greenspan v. Automobile Club of Michigan, 536 F. Supp. 411, 416 (E.D. Mich. 1982) (Title VII, 42 U.S.C. § 2000e-5(k)); Russell v. Curtin Matheson Scientific, 27 Fair Empl. Prac. Cas. (BNA) 1336, 1336 (S.D. Tex. 1981) (Age Discrimination in Employment Act, 29 U.S.C. §§ 262(b) and 216(b)); Connor v. Winter, 519 F. Supp. 1337, 1345 (S.D. Miss. 1981) (Voting Rights Act, 42 U.S.C. § 1973l(e)); Johnson v. Weed Eaters, Inc., 20 Fair Empl. Prac. Cas. (BNA) 1782, 1783-84 (S.D. Tex. 1979) (Title VII, 42 U.S.C. § 2000e-5(k)); Equal Employment Opportunity Commission v. Datapoint Corp., 412 F. Supp. 406, 409-10 (W.D. Tex. 1976) (Title VII, 42 U.S.C. § 2000e-5(k)), remanded, 570 F.2d 1246 (5th Cir.), on remand, 459 F. Supp. 668, 672 (W.D. Tex. 1978) (costs specified in 1976 decision remain recoverable by prevailing party under Title VII, 42 U.S.C. § 2000e-5(k)); see also Sledge v. J. P. Stevens & Co., Inc., 24 Empl. Prac. Dec. (CCH) ¶ 31,244 (E.D.N.C. 1980) (Title VII case in which successful plaintiffs awarded expert fees for analysis of computerized employee data); cf. Mathis v. Spears, 857 F.2d 749, 758-59 (Fed. Cir. 1988) (award of expert witness fees may be made pursuant to 35 U.S.C. § 285, which provides that a court, in exceptional cases, may award reasonable attorneys' fees to the prevailing party).

demonstrates an agreement with that interpretation and a desire to adopt it for the purposes of § 1988.

In fact, since 1976, the Congress has specifically noted with respect to more recent fee shifting statutes that the term "reasonable attorneys' fees" is intended to include experts' fees:

> The conferees intend that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case in the action or proceeding as well as traditional costs incurred in the course of litigating a case.

H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808 (concerning the fee shifting provision in The Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e)(4)(B), which uses the term "reasonable attorneys' fees") (emphasis supplied). Thus, Judge Posner's description in Friedrich is completely accurate: "reasonable attorney's fee" is a "shorthand expression" for what it reasonably costs to prevail, including experts' fees. Friedrich v. City of Chicago, 888 F.2d at 518.

The legislative process to which the fee shifting provision of § 1988 was subjected was devoid of any political compromise in which proponents of the bill conceded coverage of experts' fees. Nothing in the legislative history supports a restriction upon the policy of encouraging private enforcement of federal law by awarding a fully compensatory fee to a prevailing party. Again, experts' fees were subsumed under the general nomenclature of "reasonable attorneys' fee." Id.; accord Fairley v. Patterson, 493 F.2d 598, 606 n.11 (5th Cir. 1974) ("Court costs not subsumed under federal statutory provisions normally granting such costs against the adverse party [citation omitted] are to be included in the concept of attorneys' fees."); H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808 (in fee shifting statutes,

Congress intends the term "reasonable attorneys' fees" to include experts' fees).

Even if the legislative history were not as clear as it is, that does not necessarily mean that a limited, plain meaning construction applies to 42 U.S.C. § 1988. Judge Robert E. Keeton has proposed a four-step analysis for statutory construction in a situation where legislative history is not entirely dispositive. Judge Keeton's proposal, described as a "significant contribution" to the literature concerning statutory construction,[22] is as follows:

> First: Apply the mandate of the statute if it appears that the legislature did in fact both consider and prescribe for the problem at hand.
>
> Second: If the problem falls beyond the core area that the legislature both considered and prescribed for, defer to the legislature's manifested determinations of principle and policy to the extent they can be ascertained and are relevant to the problem at hand.
>
> Third: Subject to the obligations to apply the legislature's mandate and defer to its manifestations of principle and policy, resolve the problem at hand in a way that in the court's view produces the best total set of rules, including those within the core area of the statute and other cognate rules of law, whatever their source.
>
> Fourth: In deciding the scope of both the legislature's mandate and its manifestations of principle and policy, appraise the available evidence candidly and without resort to any contrary-to-fact presumptions; employ a rebuttable presumption that the legislature is ordinarily clear about its considered mandates, leaving courts to act in accordance with the second and third guidelines with respect to questions it does not clearly answer.

2A Sutherland Stat. Const. § 45.09 at 41 (4th ed. 1984) (emphasis added). Under this approach, Congress' policy of providing a fully compensatory fee, or "what it costs," requires a construction that includes compensation of experts under § 1988.

Judge Keeton's proposal is similar to Judge Posner's approach in construing 42 U.S.C. § 1988:[23]

> When a court can figure out what Congress probably was driving at and how its goal can be achieved, it is not usurpation -- it is interpretation in a sense that has been orthodox since Aristotle -- for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly or used a more perspicuous form of words. That is what the Supreme Court did in the Jenkins case.

Friedrich v. City of Chicago, 888 F.2d at 514; see also Posner, Statutory Interpretation -- In The Classroom And In The Courtroom, 50 U. Chi. L. Rev. 800, 817-22 (1983), reprinted in 3 Sutherland Stat. Const. 629, 641-645 (4th ed. 1984).

What can be gleaned from Judge Keeton's and Judge Posner's approaches is that mechanical application of the plain meaning rule

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22 2A Sutherland Stat. Const. § 45.09 at 41 (4th ed. 1984).

23 WVUH notes, however, that Judge Posner quite correctly identified and relied upon the dispositive nature of § 1988's legislative history. See, e.g., 888 F.2d at 518.

without further inquiry can result in an erroneous construction of a statute that blunts the policy of the legislature. As Judge Posner points out, courts that automatically seek the panacea of "plain meaning," without some considered thought, engage in a form of increased judicial activism that reduces the power of the legislative branch. 50 U. Chi. L. Rev. at 822, reprinted in 3 Sutherland Stat. Const. at 645 (4th ed. 1984).

Consistent with Judge Posner's comments and Judge Keeton's proposed analysis, this Court has held in another case where the plain meaning rule initially appeared to be controlling that the "rule" was, nonetheless, inappropriate:[24]

> But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry [citations omitted]. This is because the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." [Citation omitted]. The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.

Watt v. Alaska, 451 U.S. at 266; see also id. n.9. Thus, while the language of a statute is obviously a good beginning to its construction,

24 Likewise, the unreasonable, limited construction of Acts of Congress is totally inconsistent with the twentieth century development of administrative law in which the courts have universally recognized the need for detailed administrative regulations and deference to administrative interpretations to "flesh out" and implement Congress' policies. See Atkins v. Rivera, 477 U.S. 154, 162 (1986). If the federal courts sanction such approaches to statutory interpretation by administrative agencies, it is inconsistent not to permit a broad approach when courts, in the first instance, are called upon to interpret statutes in order to establish their outer limits -- a task better suited to courts than to administrative agencies.

the statutory language should not be the automatic conclusion of the inquiry.

In summary, recourse to the plain meaning rule in this case is wrong because it does not comport with the duty of courts to interpret statutes so as to implement completely the policies adopted by Congress. The historical facts and context out of which § 1988's fee provision grew persuasively support the conclusion that expert fees are encompassed within the term "reasonable attorneys' fee." Any other conclusion effectively eviscerates the policy of encouraging vigorous private enforcement of federal law, and, thus, this Court under the guise of "plain meaning" would alter national policy by stifling it despite Congress' broad, remedial intent. Consequently, 42 U.S.C. § 1988 must be construed to encompass fee awards for the expense of experts.

II.
This Court Has Already Held That 42 U.S.C. § 1988's Proper Interpretation May Not Be Limited To Its "Plain" Language.

In 1989, this Court decided that a fee award under 42 U.S.C. § 1988 does embrace the expenses of paralegal personnel. Missouri v. Jenkins, 491 U.S. ___, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989). Fundamental to that decision was this Court's rejection of the argument that the "plain meaning" of the statute limited § 1988 to fees personally generated by attorneys. 109 S. Ct. at 2470, 105 L. Ed. 2d at 241. Any argument predicated upon the "plain meaning" rule of statutory construction must, therefore, be rejected in this case.

A primary reason for this Court's refusal to apply the plain meaning rule in Missouri v. Jenkins was the lack of any basis for discriminating between work performed by paralegals and work performed by attorneys under a policy of encouraging private enforcement actions. Id. It simply is irrational to pay one and not to pay the other. It is equally nonsensical to discriminate between

attorneys and experts under the same policy. Friedrich v. City of Chicago, 888 F.2d at 518.

That is particularly true when it is remembered that litigation can more often be successful without paralegals than it can be without experts. While both paralegals and experts prepare and educate counsel, only the latter is truly indispensable. Indeed, the services typically performed by paralegals could be personally performed by the attorney himself, albeit in a much less cost-efficient manner. In contrast, the attorney commonly cannot perform the services of experts.

In this case, for example, the educational and experiential background of WVUH's experts could not be reasonably or economically duplicated by counsel. See Joint App. 50-62, 68-72, 79-86, 93-103 (Pl. Ex. 57; R. 305), 104-111 (Pl. Ex. 58; R 431, 446-47). Moreover, even if an attorney were to educate himself to the level of an expert in non-legal field, he could not take the stand to testify on his clients' behalf. Thus, it would be ironic that courts could award paralegal fees in order to encourage private enforcement actions but could not do so with the far more necessary expert. Such discrimination would be illogical and would contradict Congress' policy.

Remembering the Congressional policy of making whole prevailing parties who have undertaken the enormous expense of enforcing federal law, the payment of experts' fees is fully consistent with the payment of attorneys' fees and paralegals' fees. The bulk of an expert's time and, therefore, of the fees he generates, is devoted to

pretrial preparation of the attorney and of the case.[25] Such a role is, therefore, at least the functional equivalent of a paralegal's role. The fact is that the work of the attorney must be combined with the complementary and supplementary work of both paralegals and experts for there even to be a prevailing plaintiff in many cases.

Consistent with the purpose of 42 U.S.C. § 1988 to foster private enforcement actions, this Court has held that:

> the term [attorney's fee] must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit.

Missouri v. Jenkins, 109 S. Ct. at 2470, 105 L. Ed. 2d at 241 (emphasis added). This statement makes clear that the proper analysis focuses upon the totality of expenses and efforts necessary to achieve success in the litigation. This Court has held that an attorney's "work product" -- an "intensely practical" doctrine -- includes the work of various "agents" who help prepare the case. United States v. Nobles, 422 U.S. 225, 238 (1975).

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25 WVUH also submits that at trial the experts do not merely appear in the morning when the court convenes and then disappear into the night when the court recesses. After a day of trial, experts and attorneys invariably must consult and prepare for the next day's work before the trial court. In addition, even during a trial, experts do not linger in the hallway reading newspapers and biding their time until they are called; most often, as was true in this case, they attend the trial, critique the examination and evidence as it is presented, and make suggestions to counsel on cross-examination.

In addition, the Court's analysis in Missouri v. Jenkins is fully consistent with the legislative history of § 1988, which explicitly stated that awards should reimburse prevailing parties "what it costs" to prevail. S. Rep. No. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910. Such an analysis admits of no conclusion other than that the fees of experts who are essential to a prevailing party must be reimbursed under 42 U.S.C. § 1988. Any other determination would render this Court's holding in Missouri v. Jenkins illogical and would require its reversal in order to adopt an overly facile "plain meaning" rule. Such a simplistic approach in this case does not honor Congress' policy. WVUH submits that this Court correctly decided Missouri v. Jenkins and that now is the time to correct the erroneous decision by the Third Circuit on the analogous issue of experts' fees.

III.
Crawford Fitting Co. v. J. T. Gibbons, Inc., Does Not Control Fee Awards Under 42 U.S.C. § 1988.

The Third Circuit's decision in this case eliminating experts' fees from the fee award was based exclusively upon its mistaken belief that Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987), controlled. See West Virginia University Hospitals, Inc. v. Casey, 885 F.2d at 34; Pet. App. A-47. Essentially, what the Third Circuit did was to apply a non-§ 1988 decision (Crawford) while refusing to apply a § 1988 precedent (Missouri v. Jenkins). This curious emphasis of inapplicable precedent and de-emphasis of controlling precedent led to the Third Circuit's incorrect conclusion that expert witness fees are not compensable under 42 U.S.C. § 1988.

Crawford concerned only 28 U.S.C. § 1821 and 28 U.S.C. § 1920, statutes of general application, as well as Fed. R. Civ. P. 54. Crawford did not deal with 42 U.S.C. § 1988, save to cite it as an exception to

the general applicability of 28 U.S.C. §§ 1821 and 1920. 482 U.S. at 444; see also id. at 445 (Justice Blackmun concurring), 446 n.1 (Justices Marshall and Brennan dissenting).[26]

In fact, 28 U.S.C. § 1821 does not apply where "otherwise provided by law," see 28 U.S.C. § 1821(a)(1), meaning whenever a statute, like 42 U.S.C. § 1988, is applicable. Consequently, the Third Circuit's misapplication of Crawford and of 28 U.S.C. § 1821 to a fee award under 42 U.S.C. § 1988 is manifest because § 1988 "otherwise" provides.

Moreover, assuming arguendo that Crawford has any applicability, that applicability is limited to attendance at trial. See 28 U.S.C. § 1821(b). Crawford does not apply to pre-trial or post-trial work. See Friedrich v. City of Chicago, 888 F.2d at 515; Denny v. Westfield State College, 880 F.2d 1465, 1472 (1st Cir. 1989).[27] The record in

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26 Many courts, including the District Court below, have recognized that Crawford is inapplicable to awards of expert witness fees under 42 U.S.C. § 1988. E.g., Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230); SapaNajin v. Gunter, 857 F.2d 463, 465 (8th Cir. 1988); Mathis v. Spears, 857 F.2d 749, 758-59 (Fed.Cir. 1988); Furr v. AT&T Technologies, Inc., 824 F.2d 1537, 1550 (10th Cir. 1987); Williams v. City of New York, 728 F. Supp. 1067, 1072 (S.D.N.Y. 1990); West Virginia University Hospitals, Inc. v. Casey, No. 86-0955, Pet. App. at C-3 to C-4 (M.D. Pa. Jan 30, 1989), rev'd, 885 F.2d 11 (3d Cir. 1989); Johns v. Whirlpool Corp., Civ. A. No. 86-2003 (D. Kan. Feb. 4, 1988); Black Grievance Committee v. Philadelphia Electric Co., 690 F. Supp. 1393, 1403 (E.D. Pa. 1988); Freeman v. Package Machinery Co., No. 83-0403F (D. Mass. Sept. 2, 1987), aff'd, 865 F.2d 1331, 1347 (1st Cir. 1988); Hillburn v. Commissioner, Connecticut Department of Income Maintenance, 683 F. Supp. 23, 27 (D. Conn. 1987), aff'd mem., 847 F.2d 835 (2d Cir. 1988); United States v. Yonkers Board of Education, 118 F.R.D. 326, 330 (S.D.N.Y. 1987).

27 Post-trial work can be as important as pre-trial work where experts are necessary to evaluate and obtain compliance with the final judgment order. Under the Third Circuit's restrictive approach, a prevailing party would be compelled to finance his experts after trial even though the defendants persist not only in their continuing violation of law but also by refusing to obey the final judgment order.

this case reflects that the vast majority of the experts' work, and, consequently, their fees, related to pre-trial preparation. Joint App. at 110-29. As revealed by the District Court's lengthy opinion, the trial transcript, and the exhibits, the experts obviously had to review numerous materials, analyze and reflect upon the data provided by the defendants, discuss these data and their conclusions with counsel in order to prepare counsel, and respond to numerous issues raised by both counsel and WVUH in order to prove the allegations contained in the complaint. See, e.g., Joint App. at 14-31, 33-48, 62-67, 73-78. (wherein the experts testified as to the materials they reviewed and the tasks they performed to be able to draw their conclusions).

Significantly, the Pennsylvania defendants stipulated that the litigation was "complex" and required the use of well-qualified experts. See Joint App. at 8, 116-17. The District Court obviously agreed, finding the experts' work "essential" to an "understanding of the theories, issues, and facts crucial to the court's analysis and ultimate factual and legal determinations." Pet. App. at C-2. Consequently, the Third Circuit clearly erred by applying Crawford to non-trial work. See Friedrich v. City of Chicago, 888 F.2d at 515; Denny v. Westfield State College, 880 F.2d at 1472.

The Third Circuit's error, however, was made more egregious by its failure to heed Missouri v. Jenkins. WVUH submits that the Third Circuit's brisk dismissal of Missouri v. Jenkins, see Pet. App. at A-47, overlooked the fundamental holding that § 1988 is not limited to fees

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(continued)
In this case, WVUH has been compelled to monitor and to take appropriate enforcement actions against the Pennsylvania defendants before the District Court. As of April 1, 1990, the Pennsylvania defendants have yet to comply fully with the final judgment order of January 31, 1989 of the District Court.

generated personally by attorneys. Pointing out the direct applicability of Missouri v. Jenkins as a § 1988 case and the inapplicability of Crawford as a non-§ 1988 case, Judge Posner, speaking for the Seventh Circuit, cogently rejected the arguments concerning Crawford. See Friedrich v. City of Chicago, 888 F.2d at 515-16. Rather than apply Crawford to the exclusion of Missouri v. Jenkins, the Seventh Circuit debunked the notion that 42 U.S.C. § 1988 absolutely must list expert witness fees as a specific reimbursable cost.

Alyeska held that the courts did not possess the equitable power to award fees, but Congress restored that power with § 1988. That equitable power prior to Alyeska and after Congress' enactment of § 1988's fee shifting provision never had any relationship to or dependence upon 28 U.S.C. § 1821. As Judge Posner succinctly and accurately describes both events and intentions, the reference in § 1988 to a "reasonable attorney's fee" is:

> the label for a power first asserted, then withheld, and finally restored; it is not an exhaustive description of the power.

Friedrich v. City of Chicago, 888 F.2d at 518 (emphasis added). Thus, Crawford's holding and analysis are simply inapposite to the question presented in this case about 42 U.S.C. § 1988. Therefore, the Third Circuit erred when it reversed the District Court's award of experts' fees.

CONCLUSION

For the foregoing reasons, West Virginia University Hospitals, Inc., prays: (1) for a reversal of the opinion and judgment of the United States Court of Appeals for the Third Circuit concerning the award of expert witness fees; (2) for reinstatement of the District Court's award of expert witness fees; and (3) for an order directing the Court of Appeals to recalculate its award of attorneys' fees to West Virginia University Hospitals, Inc., to include compensation for time spent on the expert witness fees issue before that court. West Virginia

University Hospitals, Inc., further prays for an award of reasonable attorneys' fees and costs attendant to this appeal.

Respectfully submitted,

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April 12, 1990